Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

No. _____

PHILIP A BURGHART,

Petitioner,

v.

RALPH LANDAU, JON REHNBERG, ROBERT MALPAS, EDWARD MULLER, HALCON INTERNATIONAL, INC., OXICHEM PARTNERSHIP, HALCON RESEARCH & DEVELOPMENT PARTNERSHIP, HALCON SD GROUP, INC., ARELL CORPORATION, CLAIRE LANDAU, and METTA REHNBERG, and CITIBANK, N.A., As Executors and Trustees under the Will of HARRY A. REHNBERG

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Second Circuit err in refusing to consider Petitioner's argument that recusal of the District Judge was required under 18 U.S.C. § 455(a), based ***on facts not previously known to plaintiff***, relating to past political connections of the Judge with defendants' counsel, where (a) in 1982, petitioner made a timely motion for recusal, and then withdrew the motion based upon what petitioner ***learned in 1993 (when preparing the appeal)*** was a ***false affidavit*** of defendants' counsel, the falsity of which was, or should have been, known to the Judge; and (b) in 1991, petitioner made an unsuccessful "suggestion" of recusal on the ground that the Judge's post-motion response to the 1982 recusal motion, coupled with the subsequent conduct of the case, disclosed actual bias against petitioner?

PARTIES

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed here appear in the caption of this case.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Philip A. Burghart ("Burghart") prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals in the above entitled action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated October 28, 1983, is not reported, and is annexed hereto as Appendix A.

A portion of the Transcript of Hearing before the District Court on December 15, 1982, pp 1-11) is set forth in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, by reason of the United States Court of Appeals for the Second Circuit having rendered a final de-

cision affirming the Order and Judgment of the United States District Court for the Southern District of New York dismissing the complaint in this proceeding.

The date of the Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is October 28, 1993.

The jurisdiction of the District Court was invoked pursuant to 18 U.S.C. § 1332(a)(2) (complete diversity of citizenship).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 455(a):

> Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.[1] ("§ 445(a)")

1. Section 445 was amended by Act of Dec. 5, 1974, Pub.L.No.93-512, § 2, 88 Stat. 1609.

STATEMENT OF THE CASE

Two important issues are raised in this case concerning disqualification under § 455(a).

The first issue is whether a party may properly raise on appeal the question of recusal or disqualification[2] of the Dis-

2. Some Courts have held that "recuse" and "disqualify" are used interchangeably. *See, In re School Asbestos Litigation; Pfizer Inc. v. Kelly*, 977 F.2d 764, 769, n1 (3rd. Cir. 1992):

> Except when quoting other opinions, we use "disqualify" rather than "recuse" because 28 U.S.C. § 455...uses the former term. Whether or not there was ever a distinction between disqualification and recusal, the courts now commonly use the two terms interchangeably. See, for example, *United States v. Furst*, 886 F.2d 558, 579-83 (3d Cir. 1989). The terms have also become synonymous in common usage. See, for example, Webster's Third International Dictionary of the English Language Unabridged 1900 (Merriam-Webster 1966) (providing as a definition for recuse: "to disqualify (oneself) as judge in a particular case").

trict Judge under § 455(a) after the party made a timely motion in the Court below under §§ 144 and 455(a) and subsequently withdrew the motion on the basis of an affidavit of opposing counsel which later proved to have been untrue, and where it would appear that the Judge should have known of the untruthfulness of the representation.

This issue is of great importance to both Bench and Bar, as it squarely presents the question as to ***whether a litigant is ever precluded*** from raising the question of his right to "a fair trial in a fair tribunal", which this Court has characterized as "a basic requirement of due process"[3], and whether a litigant can ever be held to have waived that right when the true facts

3. *In re Murchison*, 349 U.S. 133, 136 (1955).

concerning the matter were deliberately concealed from him by his opponent.

The second important issue presented hereby is whether disqualification is required under § 455(a) where the District Court:

(a) reacted to the recusal motion by ***grossly mischaracterizing*** it as "mud-slinging", "scurrilous", which the Court "deem[ed] an insult ..."; "an accusation...that could hardly be withdrawn", which was "based on a lie", and

(b) thereafter, in a series of Opinions that consumed over ten years, dismissed on motions all counts in plaintiff's complaint, on conflicting and totally inconsistent holdings.

The second issue is of great importance to the members of the Bar, as there is always some apprehension that one faces a "Hobson's Choice" when it appears that a recusal or disqualification motion is required by the facts as they are known or, in good faith, believed to be.

The choice is that, however well founded the recusal motion may be, there is always the prospect that the motion will be denied, and if so, there is a possibility, however slight, of Court having an adverse personal reaction to the motion, which could, in turn, impact adversely upon the merits of the case.

Is the litigant to be faced with accepting a judge who may be biased against him or her, or risk making the motion, which, if it is denied, will leave him or her facing a judge who may still have the initially perceived bias, but also another, even stronger bias, occasioned by an adverse, personal, reaction to the recusal motion itself?

Even if a judge is quite dispassionate, "judges are human"[4], and on a recusal motion, as in many of the contempt cases which have attracted this Court's attention on many occasions, the reaction of a judge, whether justified or unjustified, might affect his or her judgment. Under such circumstances, this Court has stated that:

> the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.[5]

4. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Offutt v. U. S.*, 348 U.S. 11, 14 (1954).

5. *See also, Offutt v. U. S.*, supra, 348 U.S. at 14 ("But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law."). *See also, Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

Here, the initial ground for recusal was thought to be the "appearance of bias". That was diverted by an untrue affidavit of opposing counsel, the falsity of which was, or should have been, known to the District Judge. Thereafter, due to what appears to have been a clear over-reaction by the District Judge to the recusal motion, the case developed into an eleven year odyssey which, it is believed, clearly demonstrates that far more than the "appearance" of bias dictated the outcome.

The Court of Appeals affirmed the decisions below, and, with respect to the recusal argument raised by plaintiff, ***for the first time on the true facts***, held:

> Burghart's final argument is that Judge Lowe should have recused herself because of alleged political connections between herself and appellees' counsel. Burghart ***may not raise this issue on appeal as he withdrew his motion*** for recusal four days after he filed it in 1982. Burghart attempted to reassert this

> argument through a "suggestion" that Judge Lowe recuse herself made in 1991. ***A judge's refusal to accept a litigant's "suggestion" does not constitute an appealable order***. [emphasis supplied throughout by ***boldface italics***]

Appendix A, pages 17a - 18a.

Thus, neither the District Judge nor the Court of Appeals ever ***so much as looked at the true facts concerning the grounds for possible disqualification of the District Judge***.

The decision of the Court of Appeals in refusing to consider whether the District Judge was disqualified under §455(a) conflicts with the decision of this Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and with the decisions of the Courts of Appeals every case which has passed upon the question.

Statement of The Facts

This case was commenced in April 1982, under the diversity jurisdiction of the Court.

Burghart was employed by defendant Halcon International, Inc. ("Halcon") which was owned by defendant Ralph Landau ("Landau") and decedent Harry A. Rehnberg (later his son, defendant Jon Rehnberg ("Rehnberg") and family and trust) (collectively the "Landau Rehnberg Group"). In 1970 and 1975 Burghart purchased class A non-voting stock ("Class A Stock") pursuant to employee stock purchase agreements (the "Stock Purchase Agreements")[6]; other employees had purchased Class A Stock under similar agreements and a large block was owned by the Landau Rehnberg Group.

---

6. The Class A Stock could not be sold for ten years, and then subject to Halcon's right of first refusal.

In 1978, Halcon announced a Reorganization (the "1978 Plan") pursuant to which:

(1) Halcon forced an exchange (the "Exchange") of the Class A Stock for Halcon class C non-voting stock (the "Class C Stock"), on the representation that Burghart and the other offerees were bound to accept the offer by the terms of their respective stock purchase agreements (collectively, the "Consent to Exchange")[6].

(2) Halcon offered to purchase the newly issued Class C Stock, except that held by the Landau Rehnberg Group, and also offered a compensation plan (the "Compensation Plan") to the employees who accepted the offer (the "Compensation Plan Participants") which was

7. The principal difference between the two securities was that the Class A Stock could be sold, subject to first refusal, whereas the Class C Stock could be sold only to Halcon at a price fixed by Halcon.

8. A merger was also effectuated between Archon and Halcon, with Halcon being the surviving corporation. Plaintiff contended that the merger was not necessary and was designed to obfuscate the fact that the entire exercise was designed to effectuate the exchange of stock eliminating the right of sale after ten years.

> to provide them with benefits reflecting the value of the company's stock. Burghart and an unidentified "handful" of others, did not accept that offer, were the only remaining holders of Class C Stock, other than the Landau Rehnberg Group, who then owned over 99% of all Halcon stock.

In 1981, Halcon sold a large portion of its assets for $286 million, and announced a Plan of Liquidation (the Liquidation"), under which $227 million was distributed to the stockholders, including Burghart; $30 million was paid as a bonus to the Compensation Plan Participants (though there was no obligation to make such payments); and the balance, $30 million, was placed in a liquidating trust. The remaining assets were placed into the defendant partnerships and corporate entities, which were distributed to the Halcon stockholders (the "Distributed Entities"); the Distributed Entities were structured to include, as limited partners or non-voting stockholders, not

only the holders of Class C Stock, but also the Compensation Plan Participants, and, as general partners or voting stockholders, with preferred positions, the Landau Rehnberg Group and/or their nominees.

In March, 1982, Burghart wrote a letter to Landau and Rehnberg protesting that he had been unfairly treated in connection with the Exchange Offer and the Liquidation. Two weeks later Burghart was fired.

Burghart's Claims for Relief

Claims One and Two alleged breach of contract and fiduciary duty in that the Consent to Exchange did not require Burghart to accept the Exchange Offer, as the 1978 Plan had represented. Claims Three and Four alleged breach of contract and fiduciary duty in connection with the Liquidation, in that the bonuses paid to, and the participations in the Distributed Entities granted to, the Compensation Plan

Participants resulted in a non-ratable distribution of Halcon's assets contrary to the representation in the 1978 Plan.[9] Claim Five alleged wrongful discharge in that the 1975 Stock Purchase Agreement had assured Burghart of employment by Halcon for at least ten years.

In 1985 Burghart was granted leave to amend the complaint to allege, in three additional counts, that the foregoing facts also constituted violations of the Securities Exchange Act of 1934, 15 U.S.C. § 77q(b) and Rule 10b-5, 17 C.F.R. §

9. The $30 million bonus to Compensation Plan Participants was not a debt of Halcon, as it was not required under the Compensation Plan, and since Halcon, the payee, was going out of business, it received no benefit whatsoever from the bonuses. A similar allegation was made as to the distribution of partnership and stock interests in the Distributed Entities.

240.10b-5 promulgated thereunder ("1934 Act Claims").

The 1982 Recusal Motion

The first District Judge to whom the case was assigned voluntarily recused himself and the case was assigned to Hon. Mary Johnson Lowe.

As soon as Burghart's counsel learned that the case was to be handled by Edward N. Costikyan, Esq. ("Costikyan"), Burghart, on November 8, 1982, moved for Judge Lowe's recusal, under 18 U.S.C. § 144 and 455(a). The ground for recusal was stated in the affidavit of Burghart's counsel (relevant portions quoted in Appendix B, pages 20a - 24a).

In essence, the affidavit stated that counsel believed that a possibility of bias or prejudice of Judge Lowe might exist in favor of Costikyan, Esq., based upon a report in *The New York Times* that Judge

Lowe had, prior to her appointment to the Federal bench in 1978, served in the New York City Courts since 1972 and was elected to the New York State Supreme Court in November 1977, with "the support of the Regular Democratic Organization and the new Democratic coalition."

The affidavit went on to state that the connection of Costikyan with the "Regular Democratic Organization" (formerly known as "Tammany Hall") was quite well known in New York City. and that in view of Mr. Costikyan's well known and highly respected position in the "Regular Democratic Organization", counsel believed that Judge Lowe could not have been elected with the backing of the "Regular Democratic Organization" had Costikyan "not been a strong supporter of Judge Lowe", and that because Judge Lowe's appointment to the Federal District Court followed so closely upon her

election to the State Court, one must reasonably conclude that those who helped her in her election to the State Court were also in some substantial degree responsible for her appointment to the Federal District Court.[10]

Costikyan responded with an affidavit (quoted in Appendix B, pages 24a - 26a) stating, *inter alia*, as follows:

> While I was once, some 18 years ago, active in the democratic party of this County and City, ***I have had no connection with either the regular or irregular democratic party for many***

10. Plaintiff's counsel transmitted a courtesy copy of the motion to the Court with a letter which stated, *inter alia*:

The problem may be more the "appearance" than "actual" bias, but as I read the cases, the result is essentially the same. Particularly applicable, I believe, is the discussion in *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980) *reh. den.* 613 F.2d 314, *cert. den.*, 101 S. Ct. 78; but see *United States v. Ritter*, 540 F.2d 456 (10th Cir 1976), *cert, den., Olsen Farms, Inc. v. U.S.*, 429 U.S. 951.

> ***many years.***[11] I played no role whatever in the election of Judge Lowe to the State ...Court [or]...her for appointment to the United States District Court....Not only have I had ***no position in the democratic party,*** for the last five years as a member and later chairman of the Judiciary Committee of the Association of the Bar, I have been barred from any political activity whatsoever in the judicial area.

Burghart's counsel then, based on the above representation, withdrew the motion.

The Post-Withdrawal Hearing[12]

At the first hearing before the Court, on December 15, 1982, on matters unrelated to the recusal motion, the Court brought up the recusal motion, and after reading both

11. That was the critical language on which Burghart's counsel relied in withdrawing the recusal motion. As he was to learn, in 1993, when preparing the appeal to the Court of Appeals, that statement was false and the Court should have known that it was false.

12. The relevant portion of the transcript of that hearing is set forth in Appendix B, page 19a.

of the above affidavits, stated "I do not think it is that simple".

The Court then referred to the motion as "*mud-slinging*", and castigated Burghart's counsel for having made the motion.[13]

Costikyan was then asked if he had anything to say, to which he responded:

> ....*[E]ven if I had been active in the Regular Democratic Organization*, I don't think that would be any occasion to suggest that your Honor's judgment would be affected in the slightest, and I should have said that, and I what to say that now.
>
> Beyond that, your Honor, I can only say from what I have learned and heard about your Honor's career, and *I learned about it not from being inside anything* but just because of

13. THE COURT:...Mr. Manning, I do not think one can *sling mud*, and then when one finds that they are totally in error to submit a letter saying they withdraw their *mud slinging*.

I would like for you to tell me, as an officer of my court, why you would submit such an affidavit.

> my interest and curiosity about the process, my information is that ***you were not the product of the Regular Democratic Party***; that you were the product of merit ...and that your whole career has been the product of merit and not of political activity -- and ***I never heard of you being active in any political party or political faction.***

The Court then responded with some additional comments, including:

> politics had never interested me...I was not a product of the ***Regular Democratic Organization***....I was not a candidate of the ***Regular Democratic Organization*** at that point [1977].
>
> ....
>
> I was shocked when I read the ***scurrilous remarks of yours, Mr. Manning***, and I felt that it was just absolutely necessary, ***since an accusation was made that could hardly be withdrawn***, that we set the record straight.

Finally the Court and Costikyan stated that neither knew the other and had never had any dealings between themselves, and the Court concluded with the following statement to Burghart's counsel:

> THE COURT: *Your inference, sir, is scurrilous*, that because a Judge sits on the bench and what you assumed totally in error, what that Judge's background may be, that that Judge is going to demean her oath to treat everybody -- the rich and the poor -- fairly because of *a feigned or invented political background*, I deem *an insult* -- and I have no problem saying that.
>
> First, *your facts were totally in error* but then the implication that even if they were true, that my oath of office is not a sufficient guarantee of the fact that I would do what every judge is supposed to do. I find this just --
>
> MR. MANNING: Your Honor -- may it please the Court, I cited two cases to the Court, and those two cases were cases where the appearance was the issue -- not the fact.
>
> THE COURT: Was the appearance *based upon a lie*?

Burghart's Counsel's Obvious Lack Of Knowledge of The True Facts

Burghart's counsel, believing that he could accept as true the affidavit of Costikyan (quoted *supra*), did not pursue that matter further. As Burghart's counsel informed the Court of Appeals, it was only

after he began work on the appeal to the Court of Appeals in mid 1993, that, by sheer fortuity, he happened to begin reading a book by the former Mayor of New York, Edward I. Koch. That book casually mentioned Costikyan's involvement in the New York City elections in 1977.[14] Neither Burghart nor his counsel had previously been aware of such involvement by Costikyan.

Following learning of that, a search of *The New York Times* ("*Times*") produced the information hereinafter referred to.

From counsel's affidavit in support of Burghart's recusal affidavit, it should have been readily apparent to both Costikyan and Judge Lowe that Burghart's counsel was not aware of several highly relevant matters about which both Costikyan and the

14. See *Edward I. Koch*, MAYOR (Simon & Schuster, 1984), pp. 51-53.

Court chose, not only to keep silent, but to studiously avoid.

It was clear to Costikyan and the Court that Costikyan had been the "boss of Tammany Hall", as the recusal affidavit had stated (see footnote 18, *infra*) and Costikyan's affidavit had affirmed. It was equally clear that Burghart's counsel *did not know* that Costikyan had at some later date associated himself with the "reform movement" in the Democratic Party, which became known as the New Democratic Coalition, and that:

(a) In 1975, a scant five years before the above hearing took place, Costikyan and Judge Lowe had been seeking in the New York City elections, to be the nominees of the ***New Democratic Coalition*** -- on the

same "ticket" -- for, respectively, Mayor[15] and Justice of the Supreme Court of New York[16];

(b) later in the campaign, Costikyan had withdrawn as a candidate and become co-chairman of the campaign of Democrat Edward I. Koch for Mayor of New York[17], who was

15. *Times*, April 30, 1977, p. 23, col. 1: ***Mayoral candidates*** Koch, ***Costikyan*** and others discuss issues. May 2, 1977, p. 40, col. 1: ***Mayoral candidate Costikyan*** referred to as "a former Manhattan democratic leader").

16. *Times*, September 20, p. 45, col. 1: The nomination of Edward I. Koch by the Democrats gives his campaign manager John LoCiccary, a ***New Democratic Coalition*** leader ***very active in judgeship selection***, extensive power at the convention.

....

The ***New Democratic Organization*** was striving to "dislodge" group of six judges as alternative to the Regular Democratic Organization's slate, ***Judge Lowe*** was one of those considered.

17. *Times*, May 15, 1977, p. 1, col. 5: ***Costikyan quits race for mayoralty nomina-***

(continued...)

supported by *both the New Democratic Coalition and the Regular Democratic Organization*[18]; and

17. (...continued)
tion and accepts appointment as Koch's campaign co-chairman. "The *Costikyan endorsement* will be followed, he [Koch] predicted happily, by his winning the support of the *New Democratic Coalition*, the umbrella group for the party's *"reform" faction*, which meets today to designate candidates. *Id.*, August 21, 1977, p. 1, col. 6: Following Koch victory in Democratic run-off, Koch seen as overwhelming favorite in mayoral election; *Koch reports that Costikyan and other named persons will supervise transition of power in City Hall.* *Id.*, September 21, 1977, p. 1 lead headline: "KOCH APPOINTS BADILLO, *COSTIKYAN* AND RENGEL TO HIS TRANSITION TEAM" [photograph of Costikyan underneath].

The latter was the same edition that reported that at the Democratic nominating convention the previous night, Judge Lowe was nominated by delegates from both the Regular Democratic Organization and New Democratic Coalition. *See also*, footnote 19.

18. *Times*, November 10, 1977. p. 1, [Following the general election] lead headline: "KOCH STARTS BUILDING STAFF WITH *COSTIKYAN* AS FIRST DEPUTY MAYOR". Sec. D, p. 13: List of winning candidates, shows *Judge Mary Johnson Lowe, on Democratic and Liberal*
(continued...)

(c) Judge Lowe, *who had been for years* associated closely with the *New Democratic Coalition*[19], was also a successful in her

18. (...continued)
tickets, elected to New York Supreme Court. Sec. D, p. 15: "He [*Costikyan*] served for three years as head of the New York County Democratic Party during the administration of Robert F. Wagner. As "*the boss of Tammany Hall*,' he had made his way through the treacherous rivalries of a fratricidal party making.

19. *Times*, September 19, 1971, p. 29, col. 1: Democratic judicial convention was held to fill State Supreme Court vacancies; Democrats nominated candidates who were opposed by *unsuccessful Reform nominees* including *Mary Johnson Lowe*.

Times, September 20, 1971, p. 28, col. 5: *Liberal party's* judicial convention nominated Mary Johnson Lowe for New York Supreme Court seat.

Times, September 16, 1974 (p. 36, col. 1): *New Democratic Coalition lost* to the Regular Democratic Organization for selection of candidates for Supreme Court judgeships in what was described as an "often rancorous nominating convention"; Judge Louis Fusco, Jr. *defeated Criminal Court Judge Mary Johnson Lowe*.

bid for election as Justice of the Supreme Court of New York, initially supported by the *New Democratic Coalition*, and later supported by that group and the *Regular Democratic Organization*.[20]

Certainly both Costikyan and the Court were aware of those facts at the time Costikyan's 1982 affidavit was submitted, which stated "*I have had no connection with either the regular or irregular democratic party for many many years*. That statement

20. *Times*, September 20, Sec. 2, p. 3, col. 6): "The regular Democratic organization pulled a stunning upset of the *anti-organization New Democratic Coalition* ...at the ... nominating convention last night when it captured two of the six State Supreme Court judgeship posts in the November ballot.

"The other Supreme Court nominations for Manhattan and the Bronx went *by unanimous vote to candidates who had the support of both regular and coalition delegates, [one being] Judge Mary Johnson Lowe...*"

was, at best, disingenuous, and, at worse, a blatant falsehood.

It would also appear that the Court's statements that "*I was not a candidate of the Regular Democratic Organization* at that point [1977]." and the reference to "*a feigned or invented political background*" which the Court considered "*an insult*" was also disingenuous, as was the statement of Costikyan that the Court's "whole career has been the product of merit and *not of political activity*".

The 1991 Suggestion Regarding Recusal

In 1991, in the ninth year of the matter, in response to the Court's instruction to defendants that they remake a motion for summary judgment on Claims three and Four, which the Court had denied on three prior occasions (on the ground that disputed issues of fact were presented) Burghart responded, *inter alia*:

The history of this case has been as follows:

April 6, 1982 - Complaint filed.

May 5, 1982 - Complaint amended as of right.

July 1, 1982 - Defendant moved for dismissal or summary judgment of all claims; thereafter defendant withdrew its motion as to claims three and four; plaintiff cross-moved for summary judgment on all claims.

February 4, 1984 - After a lapse of ***nineteen months***, the Court granted defendants' motion and denied plaintiff's motion.

March 1, 1984 - Defendant answered the remaining allegations of the complaint.

July 23, 1984 - Plaintiff moved to amend complaint.

January 10, 1985 - After a lapse of five and one-half months, Magistrate Raby recommended that plaintiff's motion be granted except for ninth claim. Defendants filed objections.

October 18, 1985 - After a lapse of ***nine months***, this Court affirmed the Magistrate's decision.

December 18, 1985 - Defendants moved to dismiss claims six through eight of the complaint and for summary judgment on claims three and four.

> August 8, 1989 - After a lapse of ***forty-four months***, this Court granted defendants' motion, except as to claims three and four.
>
> September 13, 1989 - Plaintiff moved for reargument and reconsideration and for leave to amend the complaint to assert RICO claims.
>
> April 24, 1991 - After a lapse of ***nineteen months*** this Court denied plaintiff's motion in its entirety, and at the end of that opinion inexplicably stated that "Counsel are directed to call this Court's Courtroom Deputy to schedule a hearing on defendant's renewed motion, after discovery[21], to dismiss Claims Three and Four."
>
> ....
>
> Based on the history of this case, the plaintiff has been denied his day in court for too long, and for that reason declines to take issue with the renewed motion of the defendants.

21. The statement was inexplicable because discovery had been closed prior to defendant's earlier motion for summary judgment, which had been denied on the same grounds that plaintiff's earlier motion had been denied, first, on oral argument, and after rebriefing the issue, in the Court's written opinion, *i.e.*, issues of fact were presented.

Time alone is a sufficient basis for such action by plaintiff. If this Court requires only half the average amount of time taken to decide the four motions the Court has had before it, it will be mid-1993 before the outcome of this latest "renewal" motion of defendants will be determined.

Certainly, if the prior arguments, the two prior decisions of this Court and the law of the case do not determine the outcome of yet another review of the third and fourth claims, no additional arguments by the plaintiff will save them.

Plaintiff's Suggestion of Recusal

Based on the time which this case has been before the Court, and the litigation history recited above, it is respectfully suggested that this Court should recuse itself from further participation in this case.

Plaintiff believes that the decisions of this Court have been motivated not by the facts of the case or the applicable law but by what the Court incorrectly perceived nine years ago as a personal attack upon the integrity of the Court.

Shortly after this case was commenced, the plaintiff made a motion that the Court recuse itself...[summarizing the basis for the 1982 recusal motion and the Court's reaction thereto]

...

> It is respectfully submitted that the Court's conclusions were not correct and not justified by the affidavit filed by the undersigned in support of the recusal motion, nor by the letter from the undersigned to the Court, dated November 8, 1982 [footnote omitted].
>
> The unfortunate nine-year history of this case has provided grounds for believing that this Court still harbors the feelings quoted above, and that the decisions of this Court, consciously or subconsciously, have materially affected the timing of the decisions of the Court, and the outcome as well.

By Opinion and Order dated April 29, 1993 (***sub judice for another seventeen months***), the Court granted defendant's motion for summary judgment dismissing Claims Three and Four[22], which were the remaining claims in the complaint ("Opinion

22. About one month before the issuance of that Opinion dismissing the final Claims, the Court had inquired of ***the defendants' counsel*** as to the availability of the parties for trial in May, 1993.

V"), and entered Final Judgment thereon.[23] In the course of so doing, the Court denied the "suggestion" of recusal.

On appeal to the Court of Appeals Burghart's counsel raised the recusal question in his brief, representing to the Court that neither Burghart nor counsel had been aware of any of the matters hereinbefore referred to concerning the 1977 New York City election and related matters (other than referred to in the 1982 recusal motion) until after work commenced on the

23. Both the Court below and the Court of Appeals (page 15a) made much of the fact that plaintiff did not file a Statement of Undisputed Facts under Local Rule 3(g). That was not only unfair, it was grossly inaccurate. Plaintiff had previously filed two such statements, the last of which was on the defendants' prior motion for the same relief (which the Court had denied). There had been absolutely no change in the factual situation after that Statement was filed.

brief on appeal, and then only by "sheer fortuity".

Nonetheless, the Court of appeals refused to review the recusal question.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES A FUNDAMENTAL BASIS OF ALL JUSTICE: A HEARING BEFORE A FAIR TRIBUNAL, AND THE RIGHTS OF A LITIGANT TO HAVE THE QUESTION OF POSSIBLE JUDICIAL BIAS HEARD BY A COURT UNDER ALL REASONABLE CIRCUMSTANCES

A. The Controlling Principles Of § 455(a) Are Set Forth In This Court's Decisions In *Liljeberg v. Health Services Acquisition Corp.* and *In re Murchison*

This Court held, in *In re Murchison*, 349 U.S. 133, 136 (1955)(dealing with the predecessor[24] of present § 455(a)):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an ab-

24. Prior to the 1974 amendments, § 455, 28 U.S.C. § 455 (1970 ed.), provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

> sence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.... Circumstances and relationships must be considered.... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice.' (Citation)"[25]

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), which cited and followed *Murchison*, this Court

25. Citing *Murchison*, the Court of Appeals for the Fifth Circuit, in *U.S. v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976) stated:

> The truth pronounced by Justinian more than a thousand years ago that, "Impartiality is the life of justice,' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and affect the measure of its judgments. If the judge finds himself possessed of those sentiments, he should recuse himself....

had occasion to apply amended § 455(a), the purpose of which was summarized as follows:

> The statute was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974). See S. Rep. No. 93-419, p. 1 (1973); H. R. Rep. No. 93-1453, pp. 1-2 (1974). The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test. See S. Rep. No. 93-419, at 5; H. R. Rep. No. 93-1453, at 5. [486 U.S. at 859, fn. 7].[26]

26. See also, *U. S. v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976) Congress enacted the revision to make the statute conform to the Code of Judicial Conduct, 119 Cong. Rec. 33029 (1973) (remarks of Senator Burdick) as well as to "broaden and clarify the grounds for disqualification", 119 Cong. Rec. 33029 (1973), and to substitute an objective test of reasonableness for the subjective test of the former Section 455. Under the broader standard of revised Section 455(a), disqualification is appropriate not only where there is actual or apparent bias or prejudice, but also when the circumstances are such that the judge's

(continued...)

The Opinion affirmed and quoted with approval the holding of the Court of Appeals as follows:

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.... Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the

26. (...continued)
"impartiality might be reasonably questioned." See 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, Section 3549.... Moreover, the language of Section 455(a) allows a greater flexibility in determining whether disqualification is warranted in particular situations. 13 Wright, Miller & Cooper, Section 3542.

judge would have actual knowledge. 796 F. 2d, at 802.

The great concern of Congress for the public's confidence in the judiciary has led it to adopt 28 U.S.C.A. § 372(c) (West, 1992) (most recently revised by the Judicial Discipline and Removal Reform Act of 1990, Pub. L. No. 101-650, tit. IV, § 402, 104 Stat. 5122, 5122-23). Under that provision, "any person," even a non-litigant, may complain to the chief judge of a circuit about the conduct of a judge "prejudicial to the effective and expeditious administration[27] of the business of the

27. Is there a more glaring example of non "expeditious administration" than the Court's taking ***eleven years*** to dismiss on a few motions the eight claims asserted in this relatively simple case? However, the decisions under this section indicate that such complaints are to be dealt with on appeal, not by complaint under § 372(c). *Re Charge of Judicial Misconduct*, 685 F.2d 1226 (9th Cir. 1982); *Re Charge of Judicial*

(continued...)

physical inability to discharge the duties of office.[28]

B. This Court, In *Liljeberg*, Held That A Litigant Might Raise The Question of Disqualification For Bias Under Almost Any Reasonable Circumstance

In *Liljeberg*, the factual basis for disqualification was not discovered until ten months after the trial by the District Court had been completed and the case had been appealed to the Court of Appeals and affirmed. A motion was filed under Rule 60(b) to set the judgement aside. After prolonged proceedings below in both the

27. (...continued)
Charge of Judicial Misconduct, 685 F.2d 1226 (9th Cir. 1982); *Re Charge of Judicial Misconduct*, 691 F.2d 923 (9th Cir. 1982); *Re Petition of Lauer*, 788 F.2d 135 (8th Cir. 1985). *Cf. Re Judicial Complaint under 28 U.S.C. Section 372*, 795 F.2d 379 (4th Cir. 1986).

28. *In Re School Asbestos Litigation; Pfizer Inc. v. Kelly*, 977 F.2d 764, 776 (3rd Cir. 1992).

District and Court of Appeals, this Court granted certiorari.

The Court stated the issues before it were:

> We must first determine whether § 455(a) can be violated based on an appearance of partiality, even though the judge was not conscious of the circumstances creating the appearance of impropriety, and second, whether relief is available under Rule 60(b) when such a violation is not discovered until after the judgment has become final.

486 U.S. at 858

The Court answered both questions in the affirmative.

On the question of the manner by which the disqualification issue was raised, the Court stated:

> Section 455 does not, on its own, authorize the reopening of closed litigation. However, as respondent and the Court of Appeals recognized, Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. ... Rule 60(b)(6) relief is accordingly neither categorically available nor ca-

> tegorically unavailable for all § 455(a) violations. We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), *it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.* We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955). [footnote omitted]

486 U.S. at 863

While not so stated in the Court's opinion, it is implicit that facts on which disqualification was based been discovered prior to or at the time the case was before the Court of Appeals, it could have raised the question of § 455(a) on the appeal.[29]

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29. *See United States v. York*, 888 F.2d 1050, 1055-56 (5th Cir. 1989), suggesting that this Court at least implicitly rejected a *per se* rule deeming untimely all § 455 motions raised for the first time on appeal, even if the full facts were known when the case was before the lower Court.

C. Lower Appellate Courts Adopted A Liberal Attitude In Permitting The Raising of A Disqualification Question

Most lower Courts, in a variety of factual situations, have also been exceedingly liberal on the question of when, and under what circumstances, the issue of judicial disqualification might be raised.

In *U. S. v. Ritter*, 540 F.2d 459 (10th Cir. 1976), disqualification was sought and obtained on mandamus. That manner of raising the question was also approved in the more recent case of *In Re School Asbestos Litigation; Pfizer Inc. v. Kelly*, 977 F.2d 764 (3rd Cir. 1992), where disqualification was ordered on the basis of the appearance of possible bias. *See also, Rosen v. Sugarman*, 357 F.2d 794, 797 (2nd Cir. 1966); *I.B.M. v. U.S.*, 618 F.2d 923, 926 (2nd Cir. 1990).

In *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051, (5th Cir. 1975),

cert. denied, 425 U.S. 944 (1976), the recusal issue was heard and denied on the merits on an interlocutory appeal.

As was pointed out in *U.S. v. Brown*, 539 F.2d 467 (5th Cir. 1976):

> Section 455 is ...self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, *Rapp v. Van Dusen*, 3 Cir., 1965, 350 F.2d 806, 809; Through assignment of error on appeal, *United States v. Seiffert*, 5 Cir., 1974, 501 F.2d 974; *Shadid v. Oklahoma City*, 10 Cir., 1974, 494 F.2d 1267, 1268, by interlocutory appeal ...or by mandamus, *Texaco, Inc. v. Chandler*, 10 Cir. 1965, 354 F.2d 655.

It has also been held that even where the affidavits submitted in support of a motion under 18 U.S.C. § 144 do not comply with that section, and are totally defective, the question of appearance of bias should be reviewed under § 455.[30]

30. *U.S. v. Pandey*, 1992 U. S. App. LEXIS 30766.

In *U. S. v. Bosch*, 951 F.2d 1546 (9th Cir. 1991), the disqualification issue was first raised on appeal even though the defendant had been aware of the facts in the Court below. The Court first noted that

> Previously, we have held that "timeliness cannot be disregarded in all cases involving the delicate matter of disqualification under section 455," while leaving open the question whether timeliness may be disregarded in exceptional circumstances....
>
> ...[W]e subsequently stated that a party's "failure to move for recusal at the trial level does not preclude his raising the issue on appeal."... [citations omitted] we held that a party's failure to move for recusal "will significantly affect the appellate standard of review," and that a party who made no motion in the trial court "will bear a greater burden on appeal in demonstrating that the judge committed reversible error in failing to grant recusal under section 455."... Thus, even assuming that Bosch may raise his section 455 recusal claim for the first time on appeal... we would review the district court's failure to recuse himself under the plain error standard. See *id.*

Recognizing that a litigant who has full knowledge of the grounds for recusal, may have used the "wait and see" approach[31] before making the recusal motion, most Courts have nonetheless reviewed the allegations when the matter is first raised on appeal.[32]

31. Described as "the heads-I-win-tails-you-lose position" in *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1057, 1059 (7th Cir. 1992).

32. *See, e.g., In Re Stipek*, 1994 U.S. App. LEXIS 819, p. 2 (9th Cir.), following *In Re Anwiler*, 958 F.2d 925, 930 (9th Cir. 1992); *U.S. v. Taggert*, 1993 U.S. App LEXIS 1067, p. 8-9 (4th Cir). As in *Bosch, supra*, most Courts have reviewed the allegations under the "plain error" standard. Even in *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 743-44 (5th Cir. 1993), where after an appeal had been noticed, the recusal motion was made under Rule 60(b), which was denied and from which no appeal was taken. Holding that the matter was thus not before the Court, and that it was not being raised for the first time on appeal, the Court stated that it "refused

(continued...)

Where a Judge of the Court of Appeals of the Seventh Circuit was involved, and even though the alleged basis for disqualification was known before the oral argument, the recusal motion was not made until two weeks after the decision was handed down, and a month after oral argument, the Court held that it was "too late", but nonetheless reviewed and held insufficient the allegations of the motion.[33]

The Second Circuit and the Eighth Circuits appear to apply a more stringent test of "timeliness" under that do any of the other Circuits.[34]

32. (...continued)
to countenance this attempt to circumvent the requirements [of a Rule 60(b) appeal being separately required]".

33. *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1057, 1060-1061 (7th Cir. 1992)

34. *Compare, I.B.M. v. U.S.*, 618 F.2d 923 (2nd Cir. 1990) and *Schurz Communications,*
(continued...)

D. A Party Cannot Waive The Provisions of § 455(a) Unless The Judge "Fully And Fairly" Apprises Him Or Her Of The Reasons For The Appearance Of Impropriety, Under § 455(e)

It is first necessary to note that there is some question as to whether, in the Second Circuit, it is even necessary that a party raise the question of disqualification under § 455(a) by affidavit.[35]

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34. (...continued)
Inc. v. F.C.C., 982 F.2d 1057 (7th Cir. 1992), with *In Re School Asbestos Litigation; Pfizer Inc. v. Kelly*, 977 F.2d 764 (3rd Cir. 1992). *See also, Polizzi v. U.S.*, 926 F.2d 1311, 1321 (2nd Cir. 1991); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *Holloway v. U. S.*, 960 F.2d 1348, 1355 (8th Cir. 1992).

35. *See Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2nd Cir. 1987)

> We have not decided whether the filing of an affidavit of bias is required as a procedural prerequisite for § 455. See *United States v.Wolfson*, 558 F.2d at 62 n.11. Cf. [U.S. v.] Sibla, 624 F.2d at 867-68 (9th
>
> (continued...)

Apparently, the Court of Appeals refused to hear the matter of disqualification on the grounds that the withdrawal of the motion, albeit on the basis of a blatantly false affidavit, constituted a waiver by Burghart.

We would respectfully submit that there certainly was no "full and Fair" disclosure of the facts as required by § 455(e). In fact, the comments of Judge Lowe were far from full disclosure, and it would appear that Judge Lowe had reason to know that the affidavit of Costikyan was false.

35. (...continued)
Cir. 1980)](suggesting that an affidavit is not required under § 455). But when proffered, an affidavit is scrutinized for sufficiency....

II. THE DECISION OF THE COURT OF APPEALS IN REFUSING TO HEAR BURGHART'S DISQUALIFICATION ARGUMENT CONFLICTS WITH THE DECISION IN *LILJEBERG* AND WITH ALL OF THE APPLICABLE DECISIONS OF THE COURTS OF APPEALS OF THE OTHER CIRCUITS

As pointed out above, this Court and the various Courts of Appeals have adopted a very liberal attitude toward disqualification motions, even those which are made long after the case was closed, end even when the matter is first brought up on appeal when the party was fully apprised of the facts during the proceedings in the District Court.

Here, Burghart made a timely motion, and was deterred from pursuing it by the false affidavit of Costikyan.

Then Judge Lowe did not, as § 455(e) and the cases have indicated it should have done, make "full and fair" disclosure. In

fact, certain of the Court's statements were demonstratively false.[36]

Again, when Burghart made his later suggestion of recusal, Judge Lowe made no disclosure, she simply refused to disqualify herself.

However, when Burghart reached the Court of Appeals, the "ball game had changed"; he had learned the true facts, which completely refuted the false affidavit of Costikyan and the statements made by Judge Lowe as to her political background.

To this day, neither Burghart nor the Court of Appeals, nor this Court has any

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36. "I was not a candidate of the Regular Democratic Organization at that point [when she was elected in 1977]." (33a) Press reports indicated that her nomination was supported by both the New Democratic Coalition and the ***Regular Democratic Organization.***" Judge Lowe was ***elected*** as a candidate of the ***Democratic Party*** and the Liberal Party. See footnotes 18 and 20 *supra*.

idea as to why Costikyan chose to falsify has prior association with the Democratic Party (Regular and New Coalition), nor why the Court sought to disassociate herself from the Regular Democratic Organization. The plain fact is that they did.

In refusing to hear Burghart's arguments on that matter, the Court of Appeals for the Second Circuit failed to heed the desire of Congress, as expressed in the amendment to § 455(a), the additional concern of Congress as expressed in 28 U.S.C.A. § 372(c), the decision of this Court in *Liljeberg*, and the public policy concerns expressed by this Court in *Murchison*.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit to review the Order and Decision thereof.

DATED: New York, New York
January 25, 1994

Respectfully submitted,

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New York, New York 10165
212-867-1040
Counsel of Record and
Attorney for Petitioner
Philip A. Burghart

APPENDIX

APPENDIX A - ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 28, 1993

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 28th day of October, one thousand nine hundred and ninety-three.

Present:

Honorable Ellsworth A. Van Graafeiland,
Honorable Lawrence W. Pierce,
Honorable Ralph K. Winter,
Circuit Judges

PHILIP A. Burghart

Plaintiff-Appellant,

v.

O R D E R
93-7526

RALPH LANDAU; JON REHNBERG; ROBERT MALPAS; EDWARD MULLER; HALCON INTERNATIONAL, INC.; OXICHEM PARTNERSHIP; HALCON RESEARCH & DEVELOPMENT PARTNERSHIP; HALCON SD GROUP, INC.; ARELL CORPORATION; CLAIRE LANDAU; METTA REHNBERG; and CITIBANK, N.A., As Executors and Trustees under the Will of Harry A. Rehnberg,

Defendants-Appellees,

APPENDIX A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

APPENDIX A

Philip Burghart appeals from Judge Lowe's grant of summary judgment to the defendants-appellees dismissing Burghart's claims. Burghart contends that Judge Lowe erred in dismissing his claims for breach of fiduciary duty, breach of contract and the implied covenant of good faith, unjust enrichment, wrongful termination of employment, violation of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (the "1934 Act") (15 U.S.C. §§ 78j(b), 78n(e) (1988)) and SEC Rule 10b-5, and in disallowing his amendment of the complaint to assert a RICO claim under 18 U.S.C. §§ 1961-1968 (1988). He further seeks to reassert a motion for recusal that he withdrew in the district court. Because all of these arguments are meritless, we affirm the decision of the district court.

APPENDIX A

While employed at Halcon International, Inc. ("Halcon"), Burghart took advantage of two offers by appellees to purchase Class A (non-voting) stock of the corporation's parent, Archon Enterprises, Inc. ("Archon"), under strictly limited resale conditions. Under the first offer of April 29, 1970, appellees agreed to sell Burghart 1,840 shares at $65 per share, for which Burghart paid only 75 cents per share with the bulk of the share price due in April 1980. Under the second offer of February 28, 1975, appellees agreed to sell Burghart an additional 960 shares at $64.50 per share, for which Burghart paid 50 cents per share with the bulk of the share price due in July 1985. Appellees continued to exercise complete control over the corporation through their ownership of 100% of the Class B (voting) shares.

APPENDIX A

Pursuant to these stock purchase agreements, Burghart consented to stringent restrictions on his resale and control of the shares. Both the 1970 and 1975 agreements provided that in the event of the acceptance of an offer to buy or exchange the class A shares of Archon by holders of at least one half of such shares, the buyer -- in this case, Burghart -- agreed to consent to the offer as well. Furthermore, both agreements provided that all Class A shareholders would be required to consent to any merger of the corporation approved by the holders of the Class B voting stock. The agreements also gave appellees the right of first refusal should Burghart wish to sell his shares after a ten-year period from the date of the agreement. No sales before that period expired were allowed.

APPENDIX A

In 1978, appellees reorganized their companies by merging Halcon into Archon, naming the resulting entity Halcon as well. The reorganization involved two transactions: an exchange of newly created Class C shares of the new entity for the Archon Class A stock and a tender offer of $100 per share coupled with a new Executive Compensation Plan. Boards of both companies unanimously approved the transactions, as did Burghart who, pursuant to the terms of the purchase agreements, executed a written consent on April 27, 1978. However, Burghart did not tender his shares in the newly formed Halcon, preferring to retain them and pay the balance of the purchase price with a loan of $118,164 from the corporation.

In 1981, appellees decided to liquidate Halcon following a sale of its major assets

for $286 million. Following the liquidation, shareholders received a distribution of $237.05 per share, which, after deducting the balance of the purchase price for the shares which Halcon had loaned to him, entitled Burghart to $455,853.73. Shareholders also received limited partnership interests in two new partnerships and preferred stock in a newly created corporation, Halcon SD Group, Inc. ("HSD"). Some $38.5 million of the cash received from the sale was paid out to Halcon's key employees, although the Executive Compensation Plan adopted after the 1978 reorganization did not require the payment of a bonus upon liquidation. These payments were approved by a committee, none of whose members received a bonus, and by the nine-person board of directors, only two of whom received a bonus.

APPENDIX A

On March 3, 1982, Burghart's counsel wrote to appellees Ralph Landau and Jon Rehnberg, chairman and a director of HSD respectively, claiming that Burghart had been deprived of his rights by these transactions. On March 22, 1982, HSD fired a group of employees including Burghart. On April 6, 1982, Burghart brought this action in the district court.

Burghart's complaint alleged five counts against appellees. Counts 1 and 2 asserted a breach of fiduciary duty in restricting his right to sell the shares and a breach of the implied covenant of good faith in depriving him of his investment through the 1978 reorganization. Counts 3 and 4 claimed that the distributions from the 1981 liquidation had not been made ratably and sought compensatory and punitive damages and equitable relief. Count 5 contended

that Burghart had been wrongfully terminated and sought damages. The parties cross-moved for summary judgment on Counts 1 and 2, and the district court granted appellees motion, dismissing these claims as time-barred. The parties cross moved for summary judgment as to claims 3 and 4, but appellees withdrew their motion, and the district court denied Burghart's motion. Appellees moved for summary judgment on Count 5, and the district court granted the motion because it had ruled that Burghart was an "employee at will" and thus could be fired without cause under New York law.

Following this disposition, Burghart was granted leave to amend his complaint to include three additional counts stating claims under Sections 10(b) and 14(e) of the 1934 Act and SEC Rule 10b-5 but was barred from bringing a claim under RICO by

the statute of limitations. Count 6 claimed that the 1970 and 1975 stock purchase agreements had defrauded Burghart under the standards of Section 10(b) and Rule 10b-5. Count 7 claimed that the 1978 reorganization plan had defrauded Burghart under the standards of Section 14(e). Count 8 claimed that the 1981 liquidation plan defrauded Burghart under the standards of Section 10(b) and Rule 10b-5. Appellees moved to dismiss these claims and the district court did so, dismissing Count 6 as time-barred, Count 7 for failure to state a valid claim under federal securities law, and Count 8 for failure to plead fraud with particularity, as required by Fed. R. Civ. P. 9(b).

Following this disposition, appellees renewed their motion for summary judgment on Counts 3 and 4, and the district court

granted the motion. The court ruled that, basing his claim on the alleged waste of corporate assets through the payment of bonuses and manipulation of the corporate form, Burghart sought to assert a right that properly belonged to the corporation. Therefore, his failure to make demand on the board of directors rendered his claim invalid. Judge Lowe also declined a "Suggestion of Recusal" that Burghart had submitted based on allegations of previous political association between Judge Lowe and appellees' counsel Edward Costikyan.

Burghart now appeals from this judgment and alleges prejudice based on Judge Lowe's failure to recuse herself.

First, Burghart argues that his Counts 1 and 2 based on breach of fiduciary duty were not time-barred. The court exercised diversity jurisdiction over these claims

and applied the three year statute of limitations specified by CPLR § 214(4) for actions to recover damages for injury to property. Because the reorganization took place in 1978, the claim accrued at that time and was legally stale by Burghart's 1982 filing. As to Count 1 for breach of fiduciary duty, Burghart contends that the six-year period of CPLR § 213(2) should apply instead because the breach of fiduciary duty was, in fact, an action based on a contractual obligation. As to Count 2, which Burghart titled "Breach of Fiduciary Duty", Burghart contends that his charge of breach of the implied covenant of good faith necessitates the use of the six-year limitations period as well.

These arguments are meritless as a New York court has already decided these issues of New York law on almost identical facts

arising out of the same transaction. In *Peters v. Halcon Int'l. Inc.*, No. 9239/82 (N.Y. Sup. Ct. Aug. 10, 1982), *aff'd*, 480 N.Y.S.2d 300 (App. Div. 1984), *leave to appeal denied*, 489 N.Y.S.2d 1026 (1985), the New York Supreme Court ruled that claims for breach of fiduciary duty and breach of the implied covenant of good faith were both governed by the three-year limitations period of CPLR § 214(4). We defer to the ruling of the state court as we must when exercising diversity jurisdiction.

As to Counts 3 and 4, Burghart maintains both that he did comply with the demand requirement of Fed. R. Civ. P. 23.1 by sending a letter to Landau and Rehnberg and that he did not need to make demand since his claim was individual rather than derivative. In diversity cases, we apply the

choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), which dictates the application of the law of the state of incorporation, here Delaware, to these claims. Delaware long ago determined that an action alleging injury to the value of corporate stock that falls equally among the shareholders belongs to the corporation itself, and not to the individual and that a derivative rather than an individual action is appropriate. *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970). Burghart's claim that Halcon's management wasted corporate assets by awarding bonuses and reorganizing the company structure are classic derivative claims. A demand to a controlling shareholder, let alone a complaint letter to a controlling shareholder, does not constitute demand for the purposes of Fed.

R. Civ. P. 23.1. *Frankel v. Slotkin*, 984 F.2d 1328, 1335 & n.7 (2d Cir. 1993); *Kaster v. Modification Systems, Inc.*, 731 F.2d 1014, 1017 (2d Cir. 1984). Neither, as the district court found, was demand futile, a determination within its discretion. *Id.* at 1018. Moreover, the district court would have been correct in denying Burghart's claims on Counts 3 and 4 as a result of his failure to file a statement of facts pursuant to Local Rule 3(g). Given that failure, he must be deemed to have admitted all the facts asserted in defendants' Rule 3(g) statement. *See King v. New York Tel. Co., Inc.*, 873 F.2d 36, 37-38 (2d Cir. 1989).

Burghart next contends that Count 5, his wrongful termination claim, was improperly dismissed because he was at the time under contract rather than an "employee at will"

as the district court found. This argument is wholly devoid of merit. On June 5, 1981, Burghart signed a letter whereby he "release[d] and discharge[d] Halcon and its successors from their obligations under the [employment] Agreement." Burghart then became an employee at will and his employment could therefore be "freely terminated by either party at any time and for any reason or even for no reason." *Murphy v. American Home Prods. Corp.*, 461 N.Y.S.2d 232, 235 (1983); *accord Wieder v. Skala*, 593 N.Y.S.2d 752, 754 (1992).

Burghart next disputes the dismissal of his federal securities law claims, Counts 6 (the stock purchases), 7 (the 1978 reorganization), and 8 (the 1981 liquidation). Count 6 was clearly time-barred under the then-applicable six-year statute of limitations. Burghart makes no substantive argu-

ment to the contrary. Count 7 was properly dismissed for the reasons given by the district court, and, moreover, because it failed to allege injury. This is not surprising given Burghart's profit in excess of $600,000 on the transaction. Count 8 was properly dismissed because Burghart's bare allegation that the formation of Halcon's successor entities lacked a business purpose falls woefully short of the particularity requirement of Fed. R. Civ. P. 9(b). For these reasons, the district court was correct in refusing to allow the RICO claims based on the federal securities claims.

Burghart's final argument is that Judge Lowe should have recused herself because of alleged political connections between herself and appellees' counsel. Burghart may not raise this issue on appeal as he

withdrew his motion for recusal four days after he filed it in 1982. Burghart attempted to reassert this argument through a "suggestion" that Judge Lowe recuse herself made in 1991. A Judge's refusal to accept a litigant's "suggestion" does not constitute an appealable order.

/s/Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/Lawrence W. Pierce
Lawrence W. Pierce, U.S.C.J.

/s/Ralph K. Winter
Ralph K. Winter

N.S. THIS JUDGMENT WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

APPENDIX B - TRANSCRIPT OF HEARING, DECEMBER 15, 1982 (PARTIAL, PAGES 1-12) BEFORE THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
82 Civ. 2181 (MJL)

PHILIP A. Burghart,
Plaintiff,
-v-

RALPH LANDAU, JON REHNBERG, ROBERT MALPAS, EDWARD MULLER, HALCON INTERNATIONAL, INC., OXICHEM PARTNERSHIP, HALCON RESEARCH & DEVELOPMENT PARTNERSHIP: HALCON SD GROUP, INC., ARELL CORPORATION, CLAIRE LANDAU and METTA REHNBERG and CITIBANK, N.A., as Executors and Trustees under the Will of HARRY A. REHNBERG,
Defendants.

New York, New York
December 15, 1982
10:00 a.m.
Courtroom 102

Before:
HON. MARY JOHNSON LOWE,
District Judge

Appearances:
RICHARD MANNING, ESQ.,
Attorney for plaintiff

PAUL WEISS RIFKIND WHARTON & GARRISON, ESQS.,
Attorneys for defendants.
EDWARD N. COSTIKYAN, ESQ. and
SYLVIA SHAPIRO, ESQ., of counsel

APPENDIX B

THE COURT; I scheduled this case for hearing on motions, and particularly because after I read the motion by plaintiff that I recuse myself, I felt that a record should be made.

Mr. Richard Manning, attorney for the plaintiff, on November 8, 1982 submitted an affidavit pursuant to 28 USC, 144 and 455, requesting that the Court recuse itself, and the pertinent parts of the affidavit, waiting from page 2, paragraph No. 4, are as follows:

"4. I was aware that Edward N. Costikyan, Esq,, was involved in this case, but I did not know if he was going to enter an appearance as the attorney on the papers and who might possibly argue the motion before the Court. Mr. Costikyan had signed one or two stipulations, before Judge Broderick, who subsequently recused himself

on his own motion" -- and then continuing: "but he had not signed any of the important papers.

"5. On Friday afternoon, November 5, 1982, the reply papers were filed herein by the Paul, Weiss firm (the Jones, Day firm having dropped out of the case as counsel for the defendants) and were signed by Edward N. Costikyan, Esq.

"6. It is my belief, based upon facts which have been reported in the press, that a possibility of bias or prejudice of Honorable Mary Johnson Lowe might exist in favor of Edward N. Costikyan, Esq.

"7. Under date of February 10, 1978, the 'New York Times' reported that the then Judge Mary Johnson Lowe of the New York Supreme Court had been recommended by Senator Patrick Moynihan to fill a vacancy

which existed in the United States District Court.

"8. Judge Mary Johnson Lowe had, prior to her appointment to the Federal bench, served in the New York City Criminal Court since 1972 and was elected to the New York State Supreme Court in November 1977. The 'New York Times' reported that Judge Mary Johnson Lowe was elected with 'the backing of Governor Carey and the support of the Regular Democratic Organization and the new Democratic coalition.'

"9. The connection of Edward N. Costikyan, Esq. with the 'Regular Democratic Organization' (formerly known as 'Tammany Hall') is quite well known in New York City.

"10. I cannot state as to what role, if any, Edward N. Costikyan, Esq. played in the election of Judge Mary Johnson Lowe to

the New York State Supreme Court; only the insiders in the 'Regular Democratic Organization', Mr. Costikyan and Judge Lowe (and possibly a few others) might have knowledge of that.

"11. However, in view of Mr. Costikyan's well known and highly respected position in the 'Regular Democratic Organization', I believe that Judge Mary Johnson Lowe could not have been elected with the backing of the 'Regular Democratic Organization' had Mr. Costikyan not been a strong supporter of Judge Lowe.

"12. Inasmuch as Judge Lowe's appointment to the Federal District Court followed so closely upon her election to the State Supreme Court, one must reasonably conclude that those who helped her in her election to the State Supreme Court were also in

some substantial degree responsible for her appointment to the Federal District Court.

"13. It is not believed that reassignment of this case would be detrimental to the interests of either the plaintiff or the defendants, as the matter has now been submitted for a decision on the pleadings and motion papers, and any small delay that may be caused by reassignment would be of little practical consequence to either party.

"14. I, as attorney of record for the plaintiff, hereby certify that this affidavit is submitted in good faith."

Signed "Richard deY. Manning."

In reply to that affidavit and motion, I read now an affidavit submitted by Edward N. Costikyan:

"Edward N. Costikyan, being duly sworn, deposes and says:

BEST AVA

APPENDIX B

"1. I am a partner in the firm of Paul Weiss, Rifkind Wharton & Garrison attorneys for defendants. I make this affidavit in opposition to the motion of plaintiff's counsel that the court recuse itself.

"2. I am very much afraid that Mr. Manning accords me far too much. While I was once some 18 years ago, active in the democratic party of this County and City, I have had no connection with either the regular or irregular democratic party for many many years. I played no role whatever in the election of Judge Lowe to the State Supreme Court, in Senator Moynihan's recommendation of her for appointment to the United States District Court or in her appointment to that position.

"3. Not only have I had no position in the democratic party, for the last five years as a member and later chairman of the

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Judiciary Committee of the Association of the Bar, I have been barred from any political activity whatsoever in the judicial area.

"4. While I agree with Mr. Manning that reassignment of the case would not, in its present posture, be detrimental to the interest of either plaintiff or defendants, since the factual premise on the basis of which reassignment is sought is wholly unfounded, there is simply no occasion for a recusal."

Signed "Edward N. Costikyan."

I have since been informed that Mr. Manning has withdrawn his motion.

Is that correct?

MR. MANNING: That is correct, your Honor.

THE COURT: Mr. Manning, I do not think it is that simple.

Let me just complete the record. I received a letter, November 12, 1982, which reads as follows:

"Dear Judge Lowe,

"Having read the affidavit of Edward N. Costikyan, sworn to November 10, 1982, I confirm my telephone conversation with your office today wherein I withdrew my motion for the Court to recuse itself in regard to the above captioned matter."

Mr. Manning, I do not think one can sling mud, and then when one finds that they are totally in error to submit a letter saying they withdraw their mud slinging.

I would like for you to tell me, as an officer of my court, why you would submit such an affidavit.

MR. MANNING: Your Honor, as I think your Honor knows, the political workings of a

political organization, such as the regular Democratic organization --

THE COURT: Just a moment. Don't ascribe "As your Honor knows" because you are assuming without any basis in fact that I know something.

Now, unless you know that I know it, you are totally in error in saying "As your Honor knows.

Go ahead.

MR. MANNING: I stand corrected, your Honor.

The workings of the political system, other than the official reported proceedings before Committees and the election of officials and so on, are unofficial. I was very much aware of Mr. Costikyan's involvement in Tammany Hall. The later events which Mr. Costikyan recorded I was not

aware of. Had I been aware of them I would not have taken the position that I did.

I asked several members of the Bar, who are familiar with the workings of the system as I am, and they were also under the impression that Mr. Kostikyan was still active in the New York State political organization.

Now, as I read the cases, I think I explained

it' your Honor, that I thought it was an much the appearance as it was the fact.

THE COURT: We are making the record very clear; what "appearance"?

MR. MANNING: Well, the appearance that if

Mr. Costikyan was, as I supposed, a powerful factor in the Regular Democratic Organization -- as I recall there was some struggle at the time of the Court's ap-

pointment to the State bench, the Supreme Court bench, and the Regular Democratic Organization prevailed in its support of your Honor.

THE COURT: Where did you get that from?

MR. MANNING: That was in the press, your Honor.

THE COURT: In other words, you accept what you read in the press as fact and sufficient to make this kind of affidavit?

MR. MANNING: Well, I believe my affidavit explains -- that was the source of my information, your Honor.

THE COURT: Mr. Costikyan, do you have anything to say?

MR. COSTIKYAN: Yes, your Honor. First I would like to say something that I did not say in my affidavit, and perhaps I should have.

APPENDIX B

I was attempting to address myself to the factual materials -- and even if I had been active in the Regular Democratic Organization, I don't think that would be any occasion to suggest that your Honor's judgment would be affected in the slightest, and I should have said that, and I want to say that now.

Beyond that, your Honor, I can only say from what I have learned and heard about your Honor's career, and I learned about it not being inside anything but just because of my interest and curiosity about the process, my information is that you were not the product of the Regular Democratic Party; that you were the product of merit, that you were appointed, I believe, by Mayor Lindsay, who was either a republican or a democrat at the time -- I don't remember which -- and that your whole career has

been the product of merit and not of political activity -- and I never heard of you being active in any political party or political faction.

THE COURT: I will state for the record that I was appointed by Mayor Lindsay in December of 1971. I don't know whether Mayor Lindsay at that time was a republican or a democrat, because politics had never interested me.

I was not a product of the Regular Democratic Organization, whatever you may mean by that, Mr. Manning.

I served as a Criminal Court Judge from January 1972 when I was appointed, and I was selected by the Supervising Judge of New York City, who was then Mr. Justice David Ross. I served as Acting Supreme Court Justice, and I served as an active Supreme Court Justice by appointment of the

Administrator from 1973 until I was elected to the Supreme Court in 1977.

I was not a candidate of the Regular Democratic Organization at that point.

I was shocked when I read the scurrilous remarks of yours, Mr. Manning, and I felt that it was just absolutely necessary, since an accusation was made that could hardly be withdrawn, that we set the record straight.

I tell you now that the fact that Mr. Costikyan is an attorney in this case has absolutely nothing to do with my decision in this case -- and perhaps I had better ask Mr. Costikyan at this time:

Mr. Costikyan, do you know me personally?

MR. COSTIKYAN: No, your Honor, I never met you in these many years that you were

active on the bench, and this is the first time that I think I have seen you.

THE COURT: And I will support that statement that I have never spoken to Mr. Costikyan, nor had any dealings whatsoever with Mr. Costikyan, and when I walked into this court this morning, this is the first time that I had ever seen Mr. Costikyan to know who he is.

Now, Mr. Manning, is there anything further that you wish to say?

MR. MANNING: Your Honor, I would simply like to say that I would like to offer my apology to the Court if the Court feels that I have said anything scurrilous about the Court. I did not --

THE COURT: Your inference, sir, is scurrilous, that because a Judge sits on the bench and what you assumed totally in error, what that Judge's background may be,

that that Judge is going to demean her oath to treat everybody -- the rich and the poor -- fairly because of a feigned or invented political background I deem an insult -- and I have no problem saying that.

First, your facts were totally in error, but then the implication that even if they were true, that my oath of office is not a sufficient guarantee of the fact that I would do what every judge is supposed to do.

I find this just --

MR. MANNING: Your Honor -- may it please the Court, I cited two cases to the Court, and those two cases were cases where the appearance was the issue -- not the fact.

THE COURT: Was the appearance based upon a lie? I have nothing further to say about it.

The motion is withdrawn.

APPENDIX B

Now, let us turn and address ourselves to the proceedings, to the other motions.

Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

(2)

No. 93-1228

In the

Supreme Court of the United States

October Term, 1993

PHILIP A. BURGHART,

Petitioner,

-against-

RALPH LANDAU, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MOSES SILVERMAN
Counsel of Record
PAUL, WEISS, RIFKIND,
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DAVID L. KORNBLAU
ERIC R. DINALLO

February 24, 1994

18 pp

Questions Presented

1. Whether the court of appeals correctly declined to review the merits of plaintiff's motion to disqualify the district judge, where:

(a) plaintiff had withdrawn the motion in the district court four days after filing it in November 1982;

(b) plaintiff's purported "newly discovered" grounds for judicial disqualification were based on 16-year-old (and older) newspaper articles that were of public record long before plaintiff had filed his recusal motion in the district court, were asserted for the first time on appeal, and added nothing of relevance or substance to his previously withdrawn recusal motion; and

(c) consideration of the recusal issue could have had no bearing on the disposition of the appeal, since the court of appeals held that the entire action had been correctly dismissed on motion as a matter of law.

2. Whether the court of appeals correctly refused to review the district court's decision to "decline" plaintiff's 1991 "suggestion" of recusal alleging bias in the judge's conduct of the litigation, where no motion on this ground had been made or decided in the district court, and where consideration of plaintiff's "suggestion" could not have affected the appeal's outcome.

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No 93-1228

In the

Supreme Court of the United States

October Term, 1993

PHILIP A. BURGHART,

Petitioner,

-against-

RALPH LANDAU, *et al.*,

Respondents.

Rule 29.1 Statement

Respondents include the following corporations: Halcon International, Inc.; Halcon SD Group, Inc.; Arell Corporation; and Citibank, N.A., as executors and trustees under the will of Harry A. Rehnberg.

The first three of these corporations have been dissolved. Citicorp is the parent company of Citibank, N.A.

Opinion Below

The court of appeals' unpublished order unanimously affirming the district court's dismissal of this action as a matter of law is reprinted as Appendix A to the petition. (1a–18a)

Appendix B to the petition (19a–36a) is a transcript of the 1982 district court hearing in which the district court noted, and plaintiff's counsel confirmed, that plaintiff had withdrawn the recusal motion that is the subject of his certiorari petition. (26a, 35a)

Additional Rules Involved

This case involves the following rules in addition to 28 U.S.C. § 455(a), which is quoted in the petition:

1. Rule 60(b), Fed. R. Civ. P., which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

2. Rule 42.2 of this Court, which provides:

> When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or against the party's attorney or against both.

Counterstatement of the Case

Nature of the Case

This is a strike suit. It was brought under the district court's diversity jurisdiction by petitioner Philip Burghart against his former employer, defendant Halcon International, Inc., its directors, and others shortly after Burghart was fired in March 1982. Burghart had previously signed an agreement expressly abrogating his prior employment contracts and thus was dischargeable at will under black-letter New York law.[1/] He nonetheless claimed damages for wrongful discharge. Burghart also asserted four state-law damages claims based on his participation in Halcon's employee stock purchase program—even though his $1,860 cash

---

[1/] *See, e.g., Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983).

investment in Halcon stock in 1970 and 1975 had already netted him a profit of over $455,000. (Subsequent distributions lifted his profit to over $625,000—a 33,727% return.) (4a–7a)

Over defendants' strenuous objections, the district judge (Lowe, J.) gave Burghart considerable leeway to pursue his frivolous, though complex, theories. Although she dismissed his wrongful discharge claim and two of his other claims at the outset, Judge Lowe permitted him to take discovery on his two remaining state-law claims (3 and 4). (Defendants declined to take any discovery.) Judge Lowe even granted Burghart leave to amend his complaint to add three federal securities-law claims, which largely reasserted his previously dismissed state-law claims in federal garb. (9a)

In time, however, Judge Lowe dismissed all of Burghart's claims—as a matter of law—either for failure to plead a cause of action or on summary judgment. The court also denied—again as a matter of law—Burghart's motion to reargue his dismissed securities claims and for leave to amend his complaint to add a frivolous and belated RICO treble-damages claim. (3a, 9a–11a)

Burghart appealed. In arguing that dismissal of the action should be upheld, defendants pointed out to the court of appeals, among other things, that Burghart's counsel had deceptively used an ellipsis in his appellate brief to conceal crucial contractual language in order to make one of his frivolous arguments appear plausible. At oral argument of the appeal, the presiding judge (Winter, J.) chastised Burghart's counsel for his lack of candor with the court. The very next day, the Second Circuit issued an unpublished 10-page order thoroughly analyzing the district court's dismissal of the action and affirming it in all respects. Burghart sought neither reargument nor *en banc* rehearing of the panel's decision.

Burghart's certiorari petition does not challenge the Second Circuit's holding that he has no case as a matter of law. Nor does it contend that any judge of that court should have been disqualified in this matter. Accordingly, he has waived any objection to the dismissal of his action on the merits. Instead, Burghart's petition focuses exclusively on a sideshow—his aborted and utterly frivolous effort to disqualify Judge Lowe.

Burghart's 1982 Recusal Motion

On November 8, 1982, shortly after the case was reassigned to Judge Lowe (because the original judge had disqualified himself), Burghart filed a recusal motion pursuant to 28 U.S.C. §§ 144 and 455(a) alleging that "a possibility of bias or prejudice might exist in favor of" defense counsel (Edward N. Costikyan) based on speculation that Judge Lowe was in essence beholden to him for her judicial position. (20a–24a)

The sole evidentiary support for the motion was an affidavit submitted by Burghart's counsel (Richard DeY. Manning). Purporting to quote from a November 1977 *New York Times* article (not attached to plaintiff's motion papers), Mr. Manning stated in his affidavit that Judge Lowe had been elected to the *state* bench with "'the backing of Governor Carey and the support of the Regular Democratic Organization and the new Democratic coalition.'" (22a) Mr. Manning's affidavit continued:

> 9. The connection of Edward N. Costikyan, Esq. with the "Regular Democratic Organization" (formerly known as "Tammany Hall") is quite well known in New York City.
>
> 10. I cannot state as to what role, if any, Edward N. Costikyan, Esq. played in the election of Judge Mary Johnson Lowe to the New York State Supreme Court; only the insiders in the "Regular Democratic Organization," Mr. Costikyan and Judge Lowe (and possibly a few others) might have knowledge of that.
>
> 11. However, in view of Mr. Costikyan's well known and highly respected position in the "Regular Democratic Organization," I believe that Judge Mary Johnson Lowe could not have been elected with the backing of the "Regular Democratic Organization" had Mr. Costikyan not been a strong supporter of Judge Lowe.
>
> 12. Inasmuch as Judge Lowe's appointment to the Federal District Court followed so

> closely upon her election to the State Supreme Court, one must reasonably conclude that those who helped her in her election to the State Supreme Court were also in some substantial degree responsible for her appointment to the Federal District Court.

(22a–24a)

Two days after the motion was filed, Mr. Costikyan filed an affidavit categorically denying that he had played any role in Judge Lowe's appointment to the bench. Mr. Costikyan's affidavit stated in full:

> 1. I am a partner in the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for defendants. I make this affidavit in opposition to the motion of plaintiff's counsel that the court recuse itself.
>
> 2. I am very much afraid that Mr. Manning accords me far too much. While I was once, some 18 years ago, active in the democratic party of this County and City, I have had no connection with either the regular or irregular democratic party for many many years. *I played no role whatever in the election of Judge Lowe to the State Supreme Court, in Senator Moynihan's recommendation of her for appointment to the United States District Court or in her appointment to that position.*
>
> 3. Not only have I had no position in the democratic party, for the last five years as a member and later chairman of the Judiciary Committee of the Association of the Bar, I have been barred from any political activity whatsoever in the judicial area.
>
> 4. While I agree with Mr. Manning that reassignment of the case would not, in its present

posture, be detrimental to the interest of either plaintiff or defendants, since the factual premise on the basis of which reassignment is sought is wholly unfounded, there is simply no occasion for a recusal.

(25a-26a; emphasis added)

Two days later, having seen his speculative theory shattered, Burghart's counsel *withdrew* the motion. (27a)

At a hearing in December 1982, Judge Lowe took the opportunity to "set the record straight" regarding the withdrawn recusal motion:

> THE COURT: I will state for the record that I was appointed by Mayor Lindsay in December of 1971. I don't know whether Mayor Lindsay at that time was a republican or a democrat, because politics had never interested me.
>
> I was not a product of the Regular Democratic Organization, whatever you may mean by that, Mr. Manning.
>
> I served as a Criminal Court Judge from January 1972, when I was appointed, and I was selected by the Supervising Judge of New York City, who was then Mr. Justice David Ross. I served as an acti[ng] Supreme Court Justice by appointment of the Administrator from 1973 until I was elected to the Supreme Court in 1977.
>
> I was not a candidate of the Regular Democratic Organization at that point.
>
> I was shocked when I read the scurrilous remarks of yours, Mr. Manning, and I felt that it was just absolutely necessary, since an accusation was made that could hardly be withdrawn, that we set the record straight.
>
> I tell you now that the fact that Mr. Costikyan is an attorney in this case has

absolutely nothing to do with my decision in this case—and perhaps I had better ask Mr. Costikyan at this time:

Mr. Costikyan, do you know me personally?

MR. COSTIKYAN: No, your Honor, I never met you in these many years that you were active on the bench, and this is the first time that I think I have seen you.

THE COURT: And I will support that statement that I have never spoken to Mr. Costikyan, nor had any dealings whatsoever with Mr. Costikyan, and when I walked into this court this morning, this is the first time that I had ever seen Mr. Costikyan to know who he is. . . .

(32a-34a)

Time has demonstrated Judge Lowe's wisdom in putting these facts on the record despite Burghart's withdrawal of the motion. Her statements, and those in Mr. Costikyan's affidavit, remain undisputed. Yet nearly twelve years later, notwithstanding the withdrawal, Burghart is still seeking to pursue the very same unfounded accusations.

In the Second Circuit (as in his petition here), Burghart claimed that he had learned the "true facts" regarding this issue only last year, when his counsel, while working on his appeal, discovered "by sheer fortuity" a 1984 autobiography by former New York City Mayor Ed Koch and a slew of *New York Times* articles concerning Mr. Costikyan's brief 1977 mayoral campaign and Judge Lowe's judicial nominations and elections dating from the early 1970s. (Pet. 23-29 & nn.15-20) Burghart did not make any attempt to present these extra-record materials to the district court; he simply cited them in his Second Circuit brief.

Burghart has never contended (nor could he) that any of these belatedly discovered news reports establishes that Mr. Costikyan played *any* role in Judge Lowe's elevation to the state or federal bench—the only factual issue relevant to Burghart's

recusal motion. Notwithstanding Burghart's counsel's speculation and innuendo, the undisputed fact of the matter, as confirmed by both Mr. Costikyan and Judge Lowe on the record, is that Mr. Costikyan played no such role—and accordingly that there was no reason for Judge Lowe to step aside.

Lacking any factual basis for his disqualification effort, Burghart resorted in the court of appeals (as he does in this Court) to irrelevant, *ad hominem* attacks on defense counsel. He accuses Mr. Costikyan of having filed an affidavit containing a statement that was "at best, disingenuous, and, at worst, a blatant falsehood." (Pet. 28-29) This charge, like Burghart's recusal motion and indeed his entire lawsuit, is baseless. The statement in question, that Mr. Costikyan had "had no connection with either the regular or irregular democratic party for many many years" (25a), was fully accurate. As was widely reported, Mr. Costikyan had briefly sought the Democratic nomination as a mayoral *candidate* five years earlier, but he had held no *position* with the party for some eighteen years. In fact, a position with the party was the only sort of "connection" that could conceivably have had any relevance to Burghart's motion, since it was party officials (not mayoral candidates) who made judicial nominations.

Burghart's 1991 "Suggestion" of Recusal

In 1991, at the district court's invitation, defendants renewed their summary judgment motion on the only two claims remaining in the case (claims 3 and 4). In response, Burghart filed a brief in which he "decline[d] to take issue with" defendants' motion, but "suggested" (without filing an affidavit or motion) that Judge Lowe recuse herself on the basis of Burghart's "belie[f]" that the outcome and timing of her decisions had been "motivated not by the facts of the case or the applicable law but by what the Court incorrectly perceived nine years ago as a personal attack upon the integrity of the Court." (Pet. 31, 32)

This "suggestion" was just as frivolous as Burghart's 1982 recusal motion. Far from reflecting bias, the court's legal rulings painstakingly and dispassionately reviewed Burghart's convoluted

theories in five opinions spanning 87 pages and rejected them on their merits (correctly, as the Second Circuit later ruled).

Nor was Judge Lowe to blame for the fact that Burghart had dragged out his frivolous lawsuit for nine years (now almost twelve). Over and over again, he bombarded her with prolix and confusing motion papers (both in opposition to defendants' motions and in support of his own) that made his complex claims almost incomprehensible. She patiently waded through all of them. On two occasions, Judge Lowe even set a trial date for two of Burghart's claims. Defendants were prepared to go forward, but Burghart found a way to avoid trial. On the eve of both trials, he filed frivolous motions to reassert previously dismissed state-law claims by dressing them up in new but equally deficient federal-law theories. The trial dates were derailed so Judge Lowe could consider *Burghart's* motions. Then he blamed Judge Lowe for having denied him his "day in court for too long." (Pet. 31)

Judge Lowe succinctly "declined" Burghart's "suggestion of recusal" last year in her opinion granting defendants' renewed motion for summary judgment on Burghart's last two remaining claims.

The Decision Below

Burghart attempted to raise both his withdrawn 1982 judicial disqualification motion and 1991 "suggestion" on appeal. The court of appeals declined to review these matters in its unpublished order. After exhaustively discussing and affirming the district court's conclusion that Burghart's entire action failed as a matter of law, the Second Circuit observed:

> Burghart's final argument is that Judge Lowe should have recused herself because of alleged political connections between herself and appellees' counsel. Burghart may not raise this issue on appeal as he withdrew his motion for recusal four days after he filed it in 1982. Burghart attempted to reassert this argument through a "suggestion" that Judge Lowe recuse herself made in

1991. A Judge's refusal to accept a litigant's "suggestion" does not constitute an appealable order.

(17a–18a)

Argument

I.
THE PETITION RAISES NO ISSUE WORTHY OF REVIEW

Certiorari should be denied for the following reasons:

1. The questions prevented for review are moot.

The petition seeks certiorari only with respect to Burghart's claim that the district judge should have been disqualified. It does not challenge the court of appeals' holding that Burghart's entire action lacks merit as a matter of law. Accordingly, the outcome of this case—dismissal—would be unchanged by any ruling this Court might make on the recusal issue.

2. The Second Circuit's decision is fully consistent with the decisions of this Court.

Burghart argues that the Second Circuit's refusal to consider his withdrawn 1982 recusal motion conflicts with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). (Pet. 51) That decision, however, clearly *supports* the decision below. In *Liljeberg*, the Court held that a litigant who discovers grounds for disqualification of a trial judge after judgment has been entered may, in certain circumstances, seek a new trial by filing a motion *in the district court* pursuant to Fed. R. Civ. P. 60(b)(6). Nothing in *Liljeberg* requires a court of appeals to review the merits of a recusal motion that, as here, was withdrawn below. And to the extent Burghart contends that his counsel uncovered "new grounds" for recusal while preparing his appeal, under *Liljeberg* he was obliged to bring them to the attention of the district court in a Rule 60(b)(6) motion. He did not. Accordingly, none of the articles on which he relied in the court of appeals were even in the record.

Moreover, in *Liljeberg*, this Court noted, "Of particular importance, this is not a case involving neglect or lack of due diligence [by the party seeking recusal] . . . ." 486 U.S. at 863 n.11. The disqualifying conflict there "was not a matter of public record at the time the case was tried and decided." *Id.* at 864 n.11. Here, in sharp contrast, Burghart did not exercise due diligence. All of the newspaper articles he cites were published years before he made, and then withdrew, his recusal motion.

3. The decision below does not conflict with any other circuit court decision.

No other circuit court of which we are aware has considered whether the merits of a withdrawn judicial disqualification motion should be considered on appeal. We are confident, however, that any circuit court would have reached the same result that the Second Circuit did on the facts and circumstances of this case.

For example, several circuits review, under a "plain error" standard, recusal issues raised for the first time on appeal. *See, e.g.*, *United States* v. *Bosch*, 951 F.2d 1546, 1548-49 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2975 (1992); *United States* v. *Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *Hamm* v. *Members of the Board of Regents*, 708 F.2d 647, 651 (11th Cir. 1983); *United States* v. *Schreiber*, 599 F.2d 534, 535-36 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979). Under such review, the appellate court will reverse only if "'the error was highly prejudicial and there was a high probability that the error materially affected the verdict.'" *Bosch*, 951 F.2d at 1548 (quoting *United States* v. *Anguiano*, 873 F.2d 1314, 1319 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989)).

If this standard were applied here (even though Burghart's withdrawn recusal motion was *not* raised for the first time on appeal), no "plain error" could be found because (among other reasons), as the Second Circuit ruled, Burghart's action was correctly dismissed on the merits as a matter of law.

4. The unpublished order below sets no general legal standard and will not serve as a precedent in other cases.

The Second Circuit directed that its judgment "will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court." (18a) Moreover, the issues presented—the reviewability of a withdrawn judicial disqualification motion and of a declined "suggestion of recusal"—are not likely to recur.

5. Burghart's recusal motion and "suggestion" were frivolous.

Burghart has absolutely failed to make out any case for judicial disqualification, even considering his old newspaper articles that are not in the record. Thus, it would be pointless for this Court to continue this case in order to consider a completely meritless (as well as moot) argument.

6. This is a particularly inappropriate case for certiorari review because, as we believe is clear from the petition, the Court may not rely on petitioner to present a clear, concise, and accurate picture of the facts and issues below.

II.
SANCTIONS SHOULD BE IMPOSED ON PETITIONER AND/OR HIS COUNSEL

Burghart's petition is frivolous. It seeks review of an unpublished order on issues that are wholly irrelevant to the outcome of the case. Its principle strategy is to make *ad hominem* attacks on the district judge and defense counsel. The entire action has been an abusive 12-year escapade, inflicting a tremendous burden and significant expense not only on the defendants, but on the district court, the court of appeals, and now this Court as well.

We understand that this Court rarely imposes sanctions on litigants or their counsel who file frivolous certiorari petitions, but it unquestionably has the power to do so. *See* Sup. Ct. R. 42.2; *Hatch* v. *Reliance Ins. Co.*, 474 U.S. 1048 (1986); *Hyde* v. *Van Wormer*, 474 U.S. 992 (1985); *Tatum* v. *Regents of the Univ. of Nebraska-Lincoln*, 462 U.S. 1117 (1983); *see also* 28 U.S.C. § 1927.

We respectfully submit that this is one of the rare cases in which this Court should impose sanctions as a matter of deterrence, fairness, and justice.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied, and sanctions should be imposed on petitioner and/or his counsel.

Dated: February 24, 1994

Respectfully submitted,

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